United Nations AT/DEC/1156

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1156

Case No. 1255: FEDORCHENKO Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Julio Barboza, President; Mr. Kevin Haugh, Second Vice-President; Mr. Spyridon Flogaitis;

Whereas at the request of Alexander Fedorchenko, a staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, granted an extension of the time limit for filing an application with the Tribunal until 31 December 2001 and twice thereafter until 30 April 2002;

Whereas, on 30 April 2002, the Applicant filed an Application, requesting the Tribunal, inter alia:

> "...
>
> ... [to] take into account the cumulative number of irregularities and abuse, and order the Respondent to pay the Applicant ***additional*** compensation and damages equivalent to ***twelve months*** of net base salary at the rate in effect on 1 December 1998."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 31 August 2002 and periodically thereafter until 31 May 2003;

Whereas the Respondent filed his Answer on 30 May 2003;

Whereas the Applicant filed Written Observations on 10 July 2003;

Whereas the facts in the case are as follows:

The Applicant joined the Organization on a fixed-term appointment on secondment basis for a period of five years, as an Associate Translator at the P-2 level with the Russian Service, Translation Division, Department of Conference Services (DCS), on 3 November 1978 and was promoted to the P-3 level, effective 1 November 1980. The Applicant resigned from the Organization on 5 November 1982. On 5 April 1986, the Applicant was re-appointed on a fixed-term secondment basis for a period of two years, as a Translator at the P-4 level with DCS and, effective 8 September, he was reassigned to the Editorial and Official Records Division, DCS, as an Editor. The Applicant's appointment was subsequently extended several times until 1 December 1991, when he was granted a permanent appointment.

On 2 April 1992, the Applicant, responding to a list of vacancies and posts likely to become vacant by the end of 1992, expressed his interest in the P-5 level post of Chief, Official Records Editing Section (ORES), United Nations Office at Geneva (UNOG). The job description for the P-5 post indicated as a minimum requirement, inter alia,

> "university education, with preferably a graduate degree in languages and substantial previous relevant experience with documentation. ... At least 10 years experience as an editor of which 5 years with the United Nations; ... Excellent command of English, French and at least one other official language of the United Nations."

On 11 March 1993, the Applicant, having not received any information concerning his application, inquired with the Office of Human Resources Management (OHRM) as to the "current situation" of the P-5 post. On 17 March, the Applicant was informed that his name, along with other candidates, had been recommended for the post.

On 22 May 1995, the Applicant wrote to the Assistant Secretary-General, OHRM, requesting information on the status of the post while noting that three years had elapsed since the vacancy announcement was issued.

On 26 May 1995, a vacancy announcement for the same P-5 post of Chief, ORES, UNOG, was issued, with a notation that its functions "are currently being discharged by a staff member on a temporary basis." The announcement did not indicate the competencies and skills required to fill the post.

On 16 March 1998, another vacancy announcement for the same post was issued, listing under "competencies and skills", the following requirements:

> "Advanced university degree or equivalent qualification from a university or institution of equivalent status and substantial previous relevant experience with documentation. Thorough knowledge of the United Nations, its whole range of activities and its documentation. Knowledge of international affairs and extensive years of experience as an editor, of which five years should be within the United Nations. Excellent command of English, French, and at least one other United Nations official language; demonstrated proficiency in other official languages highly desirable. **Must have passed the United Nations Editor's Competitive Examination**."

On 16 April 1998, the Applicant wrote to the Assistant Secretary-General, OHRM. While noting that he had applied for the post for a third time, he stated that the rules regarding promotions had not been respected and expressed his concern that this would happen again. He further pointed out the fact that the post had been advertised as vacant, yet another staff member, who also applied for the post, had been assigned against this "frozen" post, giving her an unfair advantage in the promotion process. On 14 October the Applicant again wrote to the Assistant Secretary-General, OHRM, drawing her attention to the fact that the post had still not been filled and was still encumbered by the other candidate.

On 16 November 1998, the Applicant was notified that the Department had recommended another candidate to the post and, on 25 November, the Applicant submitted additional information to the Appointment and Promotion Board (APB). On 3 December, the APB recommended the other candidate to the post. In its report to the Secretary-General, the APB stated that

> "... In endorsing the Department's recommendation, the Board did not take into account the reference made by the Departmental Panel to the fact that [the other candidate] had acted as Officer-in-Charge of the Section since this would be tantamount to giving unfair advantage to her candidacy. The Board made its recommendation on the basis of other criteria, in particular [the other candidate's] longer experience in editing and her broader range of languages."

On 28 December 1998, the Under-Secretary-General for Management, on behalf of the Secretary-General, approved the promotion of the other candidate to the post and, on 5 January 1999, the Applicant was informed of same.

On 8 February 1999, the Applicant requested the Secretary-General to review the administrative decision to appoint the other candidate to the post.

On 8 April 1999, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB adopted its report on 31 July 2001. Its conclusions and recommendation read, in part, as follows:

> "***Conclusions and Recommendation***
>
> 35. ... the Panel *unanimously agreed* that it had no statutory competence to review the Appellant's claim of his superiority to [the other candidate] in terms of relative efficiency and performance.
>
> 36. The Panel also *unanimously agreed* that the Secretary-General's discretionary authority in promotion matters had been abused in the present case, because the promotion exercise for the P-5 post of Chief of Section, ORES/UNOG, had been delayed for more than six and half years apparently without legitimate organizational or administrative reasons, and that the unreasonable delay hurt the fundamental need of the Organization to fill the P-5 post within a reasonable time and frustrated the reasonable expectation of the Appellant to see the Administration proceed with the promotion exercise with due diligence and in good faith.
>
> 37. The Panel thus *unanimously recommends* that the Appellant be paid three-month net base salary in effect in December 1998 in compensation for the damages caused by the undue delay in the promotion exercise.
>
> ..."

On 7 December 2001, the Under-Secretary-General for Management transmitted a copy of the report to the Applicant and informed him that the Secretary-General had decided to accept the JAB's conclusions and, in accordance with its recommendation, to compensate the Applicant in the amount of three months net base salary.

On 30 April 2002, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The JAB, having determined that the Secretary-General's discretionary authority in promotion matters had been abused and having determined that there were procedural irregularities in the promotion process, failed to take into full account the circumstances of the case, the seriousness of the irregularities and their impact on the career development of the Applicant.

2. The processes and procedures for filling the post, to which the Applicant had applied on three occasions over the six-year period, were flawed, thereby denying the Applicant his right to receive full and fair consideration.

3. The criteria for awarding a compensation of only three months net base salary were arbitrary. The amount was disproportionate with the seriousness of the irregularities, abuse and delay and was inadequate considering that the abuse of administrative power cannot be corrected otherwise.

Whereas the Respondent's principal contentions are:

1. The length of the promotion exercise did not violate any of the Applicant's rights. The Applicant has no right to promotion only to being fully considered for a promotion.

2. The Applicant was fully compensated for the length of the promotion exercise. No additional compensation is warranted.

The Tribunal, having deliberated from 29 October to 19 November 2003, now pronounces the following Judgement:

I. The Applicant entered the service of the United Nations in 1978 and worked, on secondment, as a Translator, until 1982, when he resigned. In 1986, the Applicant re-entered the service of the Organization, on a fixed-term secondment basis, as a Translator at the P-4 level, in DCS until, on 1 December 1991, he was granted a permanent appointment.

On 16 March 1992, a list of vacancies was circulated, as well as a list of posts likely to become vacant by the end of 1992. The Applicant expressed his interest in the P-5 post of Chief of Section, Official Records Editing Section, UNOG. Not having received any information regarding the status of the post, in March 1993 and again in May 1995, the Applicant inquired as to the outcome of the recruitment process with regard to the post. A few days after his May inquiry, a new vacancy announcement for the same post was issued, indicating that the functions of the post were currently being discharged by a staff member on a temporary basis. Ultimately, the incumbent was recommended to fill the post but withdrew her candidacy and the post remained vacant. Subsequently, the post was "frozen" for the biennium 1996/1997.

On 16 March 1998, a third vacancy announcement for the post was issued. This time, the Administration decided to rewrite the vacancy announcement, amending the qualification requirements. The Applicant applied again and, in November 1998, he was informed that the Department had recommended another candidate for the post.

In December 1998, the APB endorsed the Department's recommendation, stating that their decision was based on criteria such as the selected candidate's experience in editing and her broader range of languages, and emphasizing that the reference made by the Department to the fact that the selected candidate had served as Officer-in-Charge of the Section, was not taken into account. The APB explained that, taking such a criterion into consideration would be unfair to any other applicant who had not had that opportunity.

On 8 April 1999, the Applicant lodged his appeal with the JAB. The JAB concluded that it did not have the competence to review the merits of the candidates or to establish the Applicant's superiority over them. The JAB, however, found that there was undue delay of more than six-and-half years in the promotion exercise for this post and therefore recommended that the Applicant be granted three months net base salary as compensation. The Secretary-General decided to accept this recommendation and this Application followed.

II. The Tribunal concurs with the JAB that it is not possible to revise the substantive decision taken, according to which the other candidate was promoted to the P-5 post; to do so would be usurping the Secretary-General's discretion in promotion proceedings. The Tribunal recalls that it has been its long standing jurisprudence that in scrutinizing promotion cases, the Tribunal will restrict itself to examining whether the decision was tainted by any element of arbitrariness. The Tribunal recently reaffirmed this position in its Judgement No. 1085, *Wu* (2002):

> "As often stated by the Tribunal, a staff member has only the right to a fair consideration for promotion but has no right to a promotion. Yet, it also goes without saying that the consideration must be fair and untainted by procedural irregularities, lack of due process, prejudice or discrimination. When the Respondent properly exercises his discretion regarding a promotion, the Tribunal will not interfere with the decision made. (See Judgement No. 1056, *Katz* (2002).)"

The Tribunal notes that in making its recommendation, the APB did not take into consideration the fact that the selected candidate was filling the post as the Officer-in-Charge. The Tribunal does not find that the selection decision was tainted by improper factors.

The Tribunal also concurs with the JAB's other conclusion, that in filling the post, the Administration did not follow proper procedures. In the Tribunal's view, this

was not only because the process lasted six-and-half years, which was the only procedural violation determined by the JAB, but also based on an examination of the entire selection process for the post, part of which was the subject of Judgement No. 974, *Robbins* (2000). In *Robbins*, the Tribunal determined that there were procedural irregularities in connection with the first two vacancy announcements for the post, and determined that "[the] lapse of over two years without a published result in the promotion process constitutes undue delay and unfair treatment."

In the present Application, the vacancy of the post was announced, the years passed and in order to obtain any information as to the outcome of the selection process the Applicant had to repeatedly request it. He received no formal response regarding the first selection procedure and the reasons why he was not selected; the vacancy announcement was re-issued and subsequently, the requirements of the post changed before yet another vacancy announcement was issued (inexplicably accepting an alternative to the requirement of a university education and degree); and, finally, the person encumbering the post for a number of years as Officer-in Charge, even though the post was apparently "frozen", got the promotion to the post. This procedure can not be acceptable, even when taking into consideration that the APB eliminated from the selection criteria the fact that the successful candidate had the experience of being the temporary incumbent of the post.

The Tribunal has repeatedly expressed its dissatisfaction with practices followed by the Administration which lead to procedural irregularities in the selection process, even when ultimately the Tribunal refrained from intervening in the substantive decision. (See Judgements No. 1087, *El-Charaoui* (2002); and, No. 1122, *Lopes Braga* (2003).)

It is the Tribunal's view that procedures, especially in matters where the Organization's employees' career and personal work satisfaction are involved, must be thoroughly respected in order to avoid injury - substantive or moral - to its staff members. Decisions ought to be taken in a timely manner and with the necessary care, so as not to create any suspicion that procedures are tailor made.

In light of all the above, the Tribunal finds that greater compensation than has been awarded by the Respondent to the Applicant would be more appropriate.

III. In view of the foregoing, the Tribunal:

1. Orders that the Applicant be awarded compensation in the amount equivalent to seven months net base salary at the rate in effect on the date of this Judgement, in addition to the compensation already paid to him;

2. Rejects all other pleas.

(Signatures)

Julio **Barboza**
President

Kevin **Haugh**
Second Vice-President

Spyridon **Flogaitis**
Member

New York, 19 November 2003

Maritza **Struyvenberg**
Executive Secretary